

**United States Department of Labor
Employees' Compensation Appeals Board**

D.N., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Chesterland, OH, Employer**

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**Docket No. 21-0591
Issued: September 27, 2021**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 21, 2020 appellant, through counsel, filed a timely appeal from a November 17, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met her burden of proof to establish greater than two percent permanent impairment of each upper extremity for which she previously received schedule award compensation.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board on separate issues.³ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On September 30, 2000 appellant, then a 39-year-old part-time mail carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained carpal tunnel syndrome and bilateral overuse syndrome of the hands causally related to factors of her federal employment. OWCP accepted the claim for mild bilateral carpal tunnel syndrome. Appellant stopped work on October 15, 2000 and OWCP paid her wage-loss compensation for disability beginning October 22, 2000. She resigned from the employing establishment, effective January 29, 2001, and obtained employment in the private sector. OWCP paid appellant's wage-loss compensation for partial disability due to her loss of wage-earning capacity beginning January 2001. Appellant underwent a left carpal and ulnar tunnel release on August 12, 2010 and a right carpal and ulnar tunnel release on December 16, 2010.

By decision dated April 25, 2012, OWCP granted appellant a schedule award for two percent permanent impairment of each upper extremity (right and left arms). The period of the award ran for 12.48 weeks from April 8 to July 4, 2012. OWCP based its impairment rating on the October 11, 2011 opinion of Dr. Robert J. Nickodem, Jr., a Board-certified orthopedic surgeon and OWCP referral physician, who found that appellant had two percent permanent impairment of each upper extremity due to carpal tunnel syndrome according to Table 15-23 on page 449 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴

OWCP determined that a conflict in medical opinion existed between Dr. Todd S. Hochman, an attending Board-certified internist, and Dr. William R. Bohl, an OWCP referral physician and Board-certified orthopedic surgeon, regarding whether appellant had continued residuals of her accepted bilateral carpal tunnel syndrome. It referred her to Dr. Dennis Glazer, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated May 16, 2016, Dr. Glazer reviewed appellant's history of injury and the medical evidence of record. On examination he found a slightly positive Phalen's test bilaterally and a negative Tinel's sign without loss of hand strength. Dr. Glazer noted that a recent electromyogram (EMG) study had demonstrated a decrease in latency, but no loss of amplitude or denervation.⁵ He found that appellant had no residuals of her right or left carpal tunnel syndrome based on the equivocal physical examination findings, lack of muscle atrophy, and the EMG study. Dr. Glazer opined that appellant could resume her usual employment without restriction.

³ Docket No. 02-0553 (issued June 10, 2002); Docket No. 03-2054 (issued October 22, 2003); Docket No. 18-1630 (issued March 7, 2019).

⁴ A.M.A., *Guides* (6th ed. 2009).

⁵ A January 22, 2016 EMG study revealed "mild focal medial neuropathy in the medial nerves bilaterally compatible with mild carpal tunnel syndrome bilaterally" with no evidence of denervation.

Based on Dr. Glazer's report, by decision dated July 12, 2016, OWCP terminated appellant's wage-loss compensation and medical benefits effective that date.⁶

An EMG and nerve conduction velocity (NCV) study dated September 15, 2017 revealed findings compatible with mild carpal tunnel syndrome bilaterally with evidence of old denervation, but no active denervation, and mild cubital tunnel syndrome without axonal loss.

On March 14, 2018 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a report dated December 7, 2018, Dr. Sami Moufawad, a Board-certified physiatrist, discussed appellant's history of carpal tunnel syndrome working as a rural mail carrier for the employing establishment. He indicated that her symptoms of numbness and tingling in the hands had continued after surgery. Dr. Moufawad noted that appellant had left her job with the employing establishment in 2000 and began working in a school as a driver. On examination he found decreased sensation to light touch at the tips of the thumb, and at the middle and index fingers bilaterally. Dr. Moufawad asserted that electrodiagnostic testing on January 22, 2016 and September 15, 2017 had revealed mild focal medial neuropathy, worse on the later study. He diagnosed bilateral carpal tunnel syndrome due to the accepted employment injury. Referencing Table 15-23 on page 449 of the A.M.A., *Guides*, Dr. Moufawad opined that appellant had seven percent permanent impairment of each upper extremity, or an additional five percent impairment on each side.

On March 23, 2020 Dr. David J. Slutsky, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), discussed appellant's history of injury and noted that she had worked in private employment as a driver at a school since 2000. He concurred with Dr. Moufawad's finding that she had seven percent permanent impairment of each upper extremity. Dr. Slutsky requested clarification regarding the basis for the prior award for two percent permanent impairment of each upper extremity. He found that appellant had reached maximum medical improvement (MMI) on December 7, 2018.

In a development letter dated April 28, 2020, OWCP requested that appellant specify whether she was requesting an increased schedule award due to new employment factors or a worsening of her accepted employment-related conditions. It noted that it had terminated her wage-loss compensation in July 2016 as she had no residuals of her accepted bilateral carpal tunnel syndrome. OWCP afforded appellant 30 days to respond to its request.

By decision dated June 18, 2020, OWCP denied appellant's schedule award claim. It found that the basis for her claim for an increased impairment was factually unclear, noting that she had not responded to its April 28, 2020 development letter.

On June 26, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

⁶ By decision dated May 30, 2017, an OWCP hearing representative affirmed the July 12, 2016 decision. By decision dated June 20, 2018, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). By decision dated March 7, 2019, the Board affirmed OWCP's June 20, 2018 decision. See Docket No. 18-1630 (issued March 7, 2019).

A telephonic hearing was held on October 2, 2020. Counsel maintained that the medical evidence established that she had employment-related carpal tunnel syndrome and that the DMA had agreed with the percentage of impairment awarded.

In a letter dated October 25, 2020, appellant advised that she did not use her hands repetitively in her job driving special needs children to and from school. She noted that she also had Raynaud's disease and her hands tingled with cold. Appellant asserted that testing eliminated other conditions other than her carpal tunnel syndrome as a cause of her Raynaud's disease. She advised that her condition was progressively worsening. Appellant asserted that Dr. Glazer had conducted a cursory examination.

By decision dated November 17, 2020, OWCP's hearing representative affirmed the June 18, 2020 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁷ and its implementing federal regulation,⁸ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.⁹ The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.¹⁰

OWCP's procedures and Board precedent provide that termination of a claim for all benefits due to a finding of no residuals of the accepted condition does not bar a subsequent schedule award.¹¹ Rather, the claims examiner should consider the schedule award matter separately from the termination of benefits.¹² This is because a claimant may have an employment-related condition that results in a permanent impairment under the A.M.A., *Guides* without a

⁷ *Supra* note 2.

⁸ 20 C.F.R. § 10.404.

⁹ For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

¹⁰ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

¹¹ *See G.H.*, Docket No. 19-1800 (issued September 4, 2020); *M.K.*, Docket No. 17-1691 (issued January 23, 2018).

¹² *R.H.*, Docket No. 17-1017 (issued December 4, 2018).

disability from work or the need for continuing medical treatment.¹³ If a claimant applies for a schedule award after termination of compensation benefits and submits sufficient medical evidence reflecting a permanent impairment as a result of the work-related injury or exposure, the claims examiner should further develop the claim.¹⁴

A schedule award can be paid only for a condition related to an employment injury. It is the claimant's burden of proof to establish permanent impairment of the scheduled member or function as a result of an employment injury.¹⁵

ANALYSIS

The Board finds that this case is not in posture for decision.

By decision dated April 25, 2012, OWCP granted appellant a schedule award for two percent permanent impairment of each upper extremity due to carpal tunnel syndrome. It subsequently determined that she had no further disability or residuals of her accepted bilateral carpal tunnel syndrome effective July 12, 2016. OWCP based its termination of appellant's wage-loss compensation and medical benefits on the opinion of Dr. Glazer, an impartial medical specialist, who opined that she had no further right or left carpal tunnel syndrome based on his physical examination and review of an EMG study.

On March 14, 2018 appellant requested an increased schedule award. In support of her claim, she submitted a December 7, 2018 impairment evaluation from Dr. Moufawad. Dr. Moufawad discussed appellant's work history as a rural carrier and in private employment as a driver for a school. On examination he found a loss of sensation at the tips of the thumb, and middle and index fingers bilaterally. Dr. Moufawad reviewed the results of electrodiagnostic testing performed in 2016 and 2017, which he advised revealed mild focal median neuropathy. He opined that appellant had seven percent permanent impairment of each upper extremity due to carpal tunnel syndrome according to Table 15-23 on page 449 of the A.M.A., *Guides*.

Dr. Slutsky, a DMA, reviewed Dr. Moufawad's report and concurred with his finding that appellant had seven percent permanent impairment of each upper extremity. He requested clarification of the basis for the prior schedule award. Dr. Slutsky opined that appellant had reached MMI on December 7, 2018, the date of Dr. Moufawad's report.

OWCP denied appellant's schedule award, finding that Dr. Moufawad's report was insufficient to establish that her increased impairment due to carpal tunnel syndrome was causally related to her accepted employment injury rather than her subsequent private employment. It did not, however, seek an opinion from the DMA regarding the cause of her permanent impairment prior to reaching this determination. Both Dr. Moufawad and the DMA found that appellant had seven percent permanent impairment of each upper extremity due to carpal tunnel syndrome.

¹³ Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.808.11 (February 2013); *B.K.*, 59 ECAB 228 (2007).

¹⁴ *See W.B.*, Docket No. 20-0225 (issued December 10, 2020); *M.K.*, Docket No. 16-0243 (issued May 9, 2016).

¹⁵ *T.M.*, Docket No. 20-1143 (issued December 14, 2020); *Veronica Williams*, 56 ECAB 357 (2005).

It is well established that proceedings under FECA are not adversarial in nature and, while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹⁶ OWCP has an obligation to see that justice is done in a manner that will resolve the relevant issues in this case.¹⁷

The case will, therefore, be remanded for OWCP to obtain an opinion from the DMA regarding the cause of appellant's increased permanent impairment of the upper extremities. Following this and any further development deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's schedule award claim.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the November 17, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 27, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁶ See *M.G.*, Docket No. 18-1310 (issued April 16, 2019); *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985).

¹⁷ See *L.T.*, Docket No. 18-1405 (issued April 8, 2019); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).